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IN THE

Supreme Court of the United States

October Term, 1960.

No. 715

RAYMOND W. CLAWSON,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Appellee.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit. Judgment Sought to Be Reviewed.

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RAYMOND W. CLAWSON,

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Appellee.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit. Judgment Sought to Be Reviewed.

Petitioner, Raymond L. Clawson, respectfully petitions for a Writ of Certiorari to review the judgment against him in the United States District Court in and for the Southern District of California, Central Division, and the judgment of affirmation in the Ninth Circuit Court of Appeals. The United States District Court rendered an opinion. Trial was by jury. The opinion of the Ninth Circuit Court of Appeals is as yet unreported, but a copy is attached hereto in the appendix and is hereby referred to.

THE COPY WITHOUT A

The defendant, your petitioner, was charged with contempt of the United States District Court.

A motion for an order to show cause why the defendant Clawson should not be adjudged and held in

criminal contempt of Court in violation of 18 U. S. C. 401 was filed in connection with Case No. 21198-CD, United States District Court, Southern District of California, Central Division, entitled United States of America, plaintiff, versus Raymond W. Clawson, defendant.

Said motion for an order to show cause [Tr. of Rec. Vol. 1, pp. 2-3], filed November 9, 1959, was supported by an affidavit of Thomas R. Sheridan, which appears in Volume 1 of the Transcript of Record on Appeal, pages 4 to 8. Summarized, the affidavit was in support of a motion to show cause why Raymond W. Clawson should not be adjudged in criminal contempt of Court in violation of 18 U. S. C. 401, and thereafter punished for criminal contempt of Court by reason of his disobedience and resistance to lawful orders, rules, decrees and commands of the United States District Court for the Southern District of California.

Clawson was charged with having failed to file an income tax return for the year 1946.

Notice of Appeal was filed, bail posted, and on August 28, 1952, the Court of Appeals for the Ninth Circuit affirmed the judgment of the District Court (198 F. 2d 792).

The United States Supreme Court denied Certiorari.

The mandate of the Court of Appeals was issued and forwarded to the Clerk of the District Court. Clawson failed to appear at the time set for the spreading of the mandate. It is contended he had no notice

thereof. Clawson was in Mexico for some time, returned to the jurisdiction of the Court, and was brought before the Court pursuant to said order to show cause [Tr. of Rec. Vol. 1, pp. 2-3, filed November 9, 1959].

The trial by the Court was had, petitioner was committed to the custody of the Attorney General for imprisonment for a period of eighteen (18) months, to commence upon the expiration and to run consecutively with the one (1) year sentence the defendant was then serving in this case for failure to file an income tax return [Tr. of Rec. Vol. 1, pp. 10-11].

Petitioner filed the Notice of Appeal to the Ninth Circuit Court of Appeals. Thereafter, briefs were filed, and on December 6, 1960, the Circuit Court rendered its opinion, affirming the judgment appealed from. The pronounced opinion of the Court is as follows:

> "Judgment of the district court finding appellant guilty of criminal contempt of court in violation of Title 18 U. S. C., Section 401 (3) is affirmed."

A copy of the opinion is attached in the appendix hereto.

Petitioner filed a Petition for Rehearing before the Ninth Circuit Court of Appeals, and hearing was denied on January 12, 1961.

Jurisdiction to review the judgment in question is conferred upon this Court by 28 U. S. C., Section 1254(1).

Opinion Below.

Trial in the United District Court was by jury. The Court rendered no opinion, except the judgment pronounced pursuant to the jury verdict of guilty.

The Circuit Court rendered its opinion, and a copy of the same is attached hereto in the appendix and is hereby respectfully referred to. A copy also appears in the record forwarded by the United States Court of Appeals, Ninth Circuit.

Questions Presented.

I.

The Evidence Was Insufficient to Justify the Verdict of Guilty.

II.

The Court Erred in Denying the Defendant's Request for a Reference to the Grand Jury and Proceeding by Way of Indictment to the End He Might Have a Trial by Jury.

III.

The Punishment Was Cruel and Unusual and in Violation of the Eighth Amendment to the Constitution.

Specifications of Error.

1. The Evidence Was Insufficient to Justify the Verdict of Guilty.

The evidence was insufficient to establish that an order was made for the appearance of the appellant in Court at a certain time and place, and where there is no order of Court, as we contend in this case, directing the appellant specifically to surrender, either in the Court or to the custody of the United States Marshal, for the purpose of executing the sentence, there was no sufficient notice.

We contend it was error for the District Court to adjudge the appellant guilty of criminal contempt in violation of 18 U. S. C. 401, which provides as follows:

> "A court of the United States shall have the power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—
>
> (1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;
>
> (2) Misbehavior of any of its officers in their official transactions;
>
> (3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command."

It is our contention that the evidence did not establish the guilt of the defendant beyond a reasonable doubt. Such contention was made by the appellant throughout the testimony taken by the Court and dur-

ing the course of argument before the Court. Counsel for defendant moved to dismiss [Tr. of Rec. Vol. 2, p. 83]. The motion to dismiss was denied [Tr. of Rec. Vol. 2, p. 91].

2. The Court Erred in Denying the Defendant's Request for a Reference to the Grand Jury and Proceeding by Way of Indictment to the End He Might Have a Trial by Jury.

The defendant made a motion to quash the order to show cause on the ground that the matter should be by way of a Grand Jury Indictment entitling the defendant to a trial by jury [Tr. of Rec. Vol. 2, p. 20]. The Court erred in stating, "No, this is a summary power given to punish for contempt." [Tr. of Rec. Vol. 2, p. 20].

3. The Punishment Was Cruel and Unusual and in Violation of the Eighth Amendment to the Constitution.

At the time of sentence, there was considerable discussion with the Court and the prosecutor had asked for a severe sentence. Defendant's counsel then objected to such a severe sentence in this language:

> "Well, Mr. Sheridan leaves me somewhat agasp, he wants your Honor to pour it on this defendant and crucify him for this. I was a prosecutor for some years in this Court. I have heard you speak of laws before, and I am sure it is a problem, it comes to the point now what Your Honor is going to do. I don't feel that Mr. Clawson, from my acquaintance with him, has contempt for courts of the United States such as Mr. Sheridan would wish you to believe." [Tr. of Rec. Vol. 2, pp. 189-190].

The Court thereupon pronounced sentence, sentencing the defendant and appellant to a penitentiary institution to be designated by the Attorney General for a period of 18 months [Tr. of Rec. Vol. 2, p. 193].

The Circuit Court merely affirmed without comment.

Statutes Involved.

18 U. S. C. 1346:

> "Jumping Bail. Whoever, having been admitted to bail for appearance before any United States commissioner or court of the United States, incurs a forfeiture of the bail and willfully fails to surrender himself within thirty days following the date of such forfeiture, shall, if the bail was given in connection with a charge of felony or pending appeal or certiorari after conviction of any offense, be fined not more than $5,000 or imprisoned not more than five years, or both; or, if the bail was given in connection with a charge of committing a misdemeanor, or for appearance as a witness, be fined not more than $1,000 or imprisoned not more than one year, or both.
>
> "Nothing in this section shall interfere with or prevent the exercise of any court of the United States of its power to punish for contempt."

Contempts—18 U. S. C. 401:

> "Power of Court.
>
> "A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—

"(1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;

"(2) Misbehavior of any of its officers in their official transactions;

"(3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command."

Statement of the Case.

A motion for an order to show cause why the defendant Clawson should not be adjudged and held in criminal contempt of Court in violation of 18 U. S. C. 401, was filed in connection with Case No. 21198-CD, United States District Court, ~~Seventh~~ Southern District of California, Central Division, entitled United States of America, plaintiff, versus Raymond W. Clawson, defendant.

Said motion for an order to show cause [Tr. of Rec. Vol. 1, pp. 2, 3], filed November 9, 1959, was supported by an affidavit of Thomas R. Sheridan, which appears in Volume 1 of the Transcript of Record on Appeal, pages 4 to 8. Summarized, the affidavit was in support of a motion to show cause why Raymond W. Clawson should not be adjudged in criminal contempt of Court in violation of 18 U. S. C. 401, and thereafter punished for criminal contempt of Court by reason of his disobedience and resistance to lawful orders, rules, decrees and commands of the United States District Court for the Southern District of California.

Summarized further, the affidavit recites that in the above numbered case a one-count Information was filed against Raymond W. Clawson charging him with failing to file an income tax return for the year 1946.

Clawson filed a Waiver of Defendant's appearance, pled not guilty, and was tried by a jury. The verdict was guilty. Clawson was sentenced to the custody of the Attorney General for one year.

Notice of Appeal was filed, and $5,000 bail posted pending appeal. During a portion of the time on appeal, Clawson was given permission to leave the jurisdiction. At that time the defendant was personally present, and a consent of the surety was filed.

On August 28, 1952, the Court of Appeals for the Ninth Circuit affirmed the judgment of the District Court. (198 F. 2d 792.)

The United States Supreme Court denied certiorari on February 2, 1953. (34 U. S. 929.)

Petition for rehearing was denied on March 16, 1953.

The mandate of the Court of Appeals was issued and forwarded to the Clerk of the District Court. The affidavit states that on or about March 19, 1953, Raymond W. Clawson was advised, through his attorney, William Strong, that on April 8, 1953, the mandate would be spread and that Clawson surrender to the United States Marshal for the commencement of his sentence.

On April 8, 1953, Clawson did not appear in the United States District Court, but his attorney, William Strong, did appear. The mandate was spread and District Judge Harry Westover granted a stay of execution until April 20, 1953, so that Clawson's attorney could file a motion to reduce sentence.

On April 15, 1953, a motion to reduce sentence was filed.

On April 20, 1953, Clawson was not present in Court, but his attorney, William Strong, was. The Court heard the motion to reduce sentence. During this pro-

ceeding, Elizabeth Beach testified for the defendant and stated that she treated Raymond Clawson for hypertension, probably caused from a coronary, on April 19, 1953, in Palm Springs. The matter was continued to April 27, 1953.

On April 27, 1953, Clawson was not in Court; his attorney was present. The Court continued the hearing for the motion to reduce sentence. Dr. Beach testified that she received a letter from Raymond Clawson, dated April 24, 1953, from Mexico; Attorney Strong testified he too had received a letter from Clawson from Mexico; the Court read into the record and commented upon the letter it had received from Raymond Clawson. Bail was ordered forfeited, and a bench warrant for the arrest of Clawson issued.

The affidavit recites on information and belief that Clawson remained out of the jurisdiction of the Court from April 24, 1953, until August 20, 1959. The affidavit further charges, upon information and belief, that Clawson knew of the orders and demands of the Court, and was in wilful and deliberate disobedience and resistance to said lawful orders, rules, decrees and commands of the Court, and was therefore in criminal contempt. The affidavit concludes by reciting such conduct caused the Government expense and had held the administration of justice up to ridicule, the proceedings being initiated in accordance with 18 U. S. C. 401(3) [Tr. of Rec. Vol. 1, pp. 4-8].

A trial before the Court was had on December 15, 1959, the Court sitting without a jury. The Court found the defendant guilty of criminal contempt of Court in violation of 18 U. S. C. 401(3), as charged in the order to show cause, and, on January 18, 1960, the Court, having asked the defendant whether he had

anything to say why judgment should not be pronounced and no sufficient cause to the contrary being shown, it was adjudged by the Court that the defendant was guilty as charged, and convicted, and it was adjudged further that the defendant was committed to the custody of the Attorney General for imprisonment for a period of eighteen months, to commence upon the expiration and to run consecutively with the one year sentence the defendant was presently then serving in this case for failure to file an income tax return, which judgment was filed May 21, 1951 [Tr. of Rec. Vol. 1, pp. 10-11].

Prior to the trial by the Court, the defendant requested a trial by jury, which request was by the Court denied. [Tr. of Rec. Vol. 2, p. 20]. At the outset of the proceedings, the appellant moved to quash the order to show cause and requested that proceedings be had by way of a Grand Jury Indictment, and the defendant also requested a trial by jury [Tr. of Rec. Vol 2, p. 20]. These requests were denied.

After judgment, a timely notice of appeal was filed [Tr. of Rec. Vol. 1, p. 12].

Reasons Relied on for Allowance of the Writ.

1. It is our contention that the evidence was insufficient, and certainly the contempt power, used summarily as it was, should be limited to cases wherein it has been established beyond a reasonable doubt that the defendant knew of the order, knew its contents, and that he disobeyed wilfully the said order. The failure of the Court to directly issue a surrender order, directing the defendant and appellant to appear in Court at a certain time, and the failure to deliver such order, had one been made, we assert establishes that the evi-

dence is completely insufficient to establish wilful contempt. There was no specific order which this defendant had knowledge of, and which he disobeyed. To support a judgment, the defendant-appellant must have had specific knowledge of a specific order. He had no notice.

2. The Court erred in denying the defendant's request for a reference to the Grand Jury and proceeding by way of Indictment. This was the type of a crime which we assert required under the Constitution that the defendant's matter be referred to the Grand Jury, that they proceed by way of Indictment, that he have the opportunity to plead thereto, and a trial by jury. It was an infamous crime as defined by the statutes and the Constitution, and he was entitled to be proceeded against accordingly by way of proceedings before the Grand Jury and trial by jury.

3. The punishment was cruel and unusual. In fact, he was given a sentence of 18 months, when under the law in the original charge he was only given one year which was the maximum provided by law, and in connection with this matter Congress has reviewed the matter under the Bail Jumping Act, which was intended to reach, we believe, such cases as this, and there Congress fixed a maximum sentence of one year. The punishment was cruel and it is indicated by the remarks of the Court that he intended to severely punish the appellant. It should be recalled that when the matter came on for trial before Judge Westover, who disqualified himself, the Court had this to say in transferring the case:

> "I just hope Judge Yankwich paddles you enough, that's all." [Tr. of Rec. Vol. 2, p. 8].

Statement of Facts Pertinent to the Appeal.

William Strong was called as a witness for the Government, and testified he was an attorney at law; that he was the retained attorney for Mr. Clawson throughout the trial of this matter in the District Court and then up to the Circuit Court [Tr. of Rec. Vol. 2, pp. 32-33]; that he filed a Petition for Certiorari. That he examined a transcript of proceedings in Judge Westover's Court, and that he was sure he was there on April 8, 1953, in the afternoon. After examining the transcript, he stated, that was the time he was there for the spreading of the mandate; that he assumed he either received a call from the United States Attorney or the Clerk's Office [Tr. of Rec. Vol. 2, p. 34].

He was asked whether he notified the defendant to be in Court on the date that the mandate was to be spread, and an objection was made that it was privileged [Tr. of Rec. Vol. 2, p. 35]. He was directed by the Court to answer the question, and he stated he did not recall notifying the defendant; that he was having difficulty in finding him, as he recalled [Tr. of Rec. Vol. 2, p. 37]; that on April 8, 1953, the Court asked him, "Where's Clawson now?"; that he told the Court, "He is in San Diego today, Your Honor." [Tr. of Rec. Vol. 2, p. 38].

The matter was then continued to April 20, 1953, on the motion for a reduction of sentence; that between the 8th of April, 1953, and the 20th of April, 1953, he did not notify the defendant to be in Court on the 20th of April, 1953; he was unable to get in touch with him; he was searching for Clawson [Tr. of Rec. Vol. 2, pp. 38-39].

That on April 20, 1953, he advised the Court he had been unable to reach Mr. Clawson; that Clawson had written him and said he would be there, but he had no address at which to reach him. He asked the matter go over a week [Tr. of Rec. Vol. 2, p. 39].

That he also told the Court he had received word from a Dr. Beach, who was in Court, that she had telephoned him that Clawson has some heart difficulty; she had seen him over the weekend; she had directed Clawson to remain in bed; that the witness told Dr. Beach to be in Court and explain that because he had not seen Mr. Clawson. He stated the doctor then testified as to what she had observed. The matter was then continued, he stated, from the 20th to the 27th of April, 1953; that between the 20th of April, 1953, and the 27th of April, 1953, he was not able to contact Mr. Clawson and advise him to be in Court on April 27, 1953 [Tr. of Rec. Vol. 2, p. 40]. He testified that by examining the transcript he remembered that Dr. Beach had informed him that Clawson was at the Pepper Tree Inn, in Palm Springs; that he telephoned the Pepper Tree Inn, but did not reach Clawson; that during the entire relationship with Mr. Clawson he used to see him from time to time [Tr. of Rec. Vol. 2, p. 41].

Mr. Strong stated that when he advised the Court that Mr. Clawson was in San Diego on the 8th of April, 1953, he had received a letter from Mr. Clawson on a number of occasions which simply said, "San Diego, California" or "Chihuahua, Mexico," but no address. That he was interested in reaching Clawson, and if he had had an address he would have written to him for personal reasons [Tr. of Rec. Vol. 2, pp. 44-45].

With reference to the 27th of April, 1953, Mr. Strong stated he had received a letter that day. It was apparently, the witness stated, a telephone call that his secretary had received from Mr. Clawson, who stated he was in Chihuahua, Mexico. He also had received a letter [Tr. of Rec. Vol. 2, pp. 46-47].

The witness stated that Clawson did not know through him; that he had not communicated with Clawson [Tr. of Rec. Vol. 2, p. 49]. A letter was received in evidence as Exhibit A [Tr. of Rec. Vol. 2, p. 50]. He stated that between the 8th of April and the 27th of April, 1953, either he or his secretary called or tried to contact persons who might be able to reach Mr. Clawson.

The witness stated that, since the 27th of April, 1953, when the Court ordered the bail forfeited and the bench warrant issued, and until August 19, 1959, he had no contact with Mr. Clawson; he had not seen him until a week before the hearing; that Mr. Clawson did not communicate with him from April 27, 1953, until August 19, 1959 [Tr. of Rec. Vol. 2, p. 52]; that during that period, April 27, 1953, until August 19, 1959, he received no communications from Mr. Clawson [Tr. of Rec. Vol. 2, p. 52].

Elizabeth Dodds Beach was called as a witness for the Government, and testified she was an osteopathic physician and surgeon; that she was the same Dr. Beach who had been in Court in April, 1953, and testified on behalf of Mr. Clawson; that on April 19, 1953 she treated Mr. Clawson in Palm Springs. It was at a motel or hotel where she treated him. It was on a Sunday, she believed, April 19, 1953. She had gone to Palm Springs on a holiday. She examined Mr.

Clawson; she returned to Los Angeles, and the following morning she saw Mr. Strong; that afternoon she appeared in Court. She stated that Mr. Clawson told her to contact his attorney and tell him that he would not be able to keep his appointment with the attorney. That she did not know Mr. Strong prior to that, but she contacted him; that she did not know the status of Mr. Clawson's case at that time [Tr. of Rec. Vol. 2, p. 58].

The witness stated she had known Mr. Clawson for some time; that he did not believe in doctors; he was a Christian Scientist; but he asked her to look at him, there was something wrong with him. She said that he had high blood pressure, and why he had not had a stroke she did not know [Tr. of Rec. Vol. 2, p. 59]. That on April 20, 1953, the matter was continued for a week; that she had received a letter from Mr. Clawson [Tr. of Rec. Vol. 2, pp. 59-60].

Marjorie Sanno testified she had received a letter, Exhibit 3; that she had known the defendant Raymond Clawson for about twenty years; that the letter, Exhibit 3, was in Mr. Clawson's handwriting.

She stated that she had no communications with Mr. Clawson from the end of March, 1953, until the end of April, 1953; she did not notify or have any communications with the defendant Clawson; that from April 27, 1953, to the date of her testimony she had had no communications from Mr. Clawson except a Christmas card [Tr. of Rec. Vol. 2, pp. 61-62].

Margaret Virginia Baldwin testified she knew Raymond Clawson, the defendant, that she had known him since 1952; that some time in 1953 she saw the defendant Clawson in Mexico; she saw him in various places

in Mexico at different times from 1953 to 1956. She testified that she had been married to him; that she went to see him in Mexico; she knew little about his business, but upon occasion he had told her he owed the Government some money and might have to serve some time [Tr. of Rec. Vol. 2, pp. 67-69]. What she knew about the sentence, she had read in the newspapers. She never discussed with Mr. Clawson just when he was coming back to the United States [Tr. of Rec. Vol. 2, pp. 70-71].

Joseph C. Alston, called on behalf of the Government, testified as follows:

That he was an FBI Agent, attached to the FBI at Los Angeles; that on August 20, 1959, he participated in the apprehension of defendant Clawson at International Airport; it was about 11:25 P. M., as he stepped from a Western Airlines Flight from Mexico City to Los Angeles. They then transported Mr. Clawson to the Los Angeles County Jail and on the way Mr. Clawson said he had not been in the United States since 1953. Clawson said that while he was in Mexico he referred to a document called the Remitter advising him to surrender himself to the United States Marshal. During the course of this testimony, the defendant spoke out, "That is not so." The conversation was not reduced to writing at that time; it was not taken down in shorthand or stenotype by anybody; he made no notes at the time as he was driving [Tr. of Rec. Vol. 2, pp. 74-76].

On cross-examination, the witness was asked about a report which he had made, and the Court refused counsel permission to examine the same [Tr. of Rec. Vol. 2, pp. 80-81].

The Government then rested [Tr. of Rec. Vol. 2, p. 82].

At that time a motion to dismiss the order to show cause was made [Tr. of Rec. Vol. 2, p. 83].

DEFENSE.

Raymond W. Clawson testified that during the years 1953 through 1959 he was in Mexico; that he went to Mexico about the 20th of April, 1953, or April 21, 1953. His purpose in going to Mexico was to locate a woman against whom he had a civil action, one Ruby Dickie Bartges Bray. She was known by different names. He had brought a lawsuit against her [Tr. of Rec. Vol. 2, pp. 91-92].

A document was marked Exhibit "A," an action brought in the United States District Court for the District of Arizona. An attorney brought the action [Tr. of Rec. Vol. 2, pp. 92-93]. This was an action in which he claimed there was due him some $90,000.00 by Mrs. Bray [Tr. of Rec. Vol. 2, p. 93].

Clawson then testified that when he left for Mexico on April 20, 1953, he did not have any knowledge that he was supposed to be in Court on the 20th or on April 27, 1953, the following week [Tr. of Rec. Vol. 2, pp. 93-94]; he had had no communications from his attorney of any kind, either from the attorney or any other person [Tr. of Rec. Vol. 2, p. 94]. He stayed in Mexico until August of 1959. He returned to this country voluntarily by airplane; he boarded the plane in Mexico City and flew to Los Angeles. At the airport he was met by certain Federal Agents, one of these was Mr. Alston, who testified [Tr. of Rec. Vol. 2, pp. 93-94]. He said he was asked by the Agent why he chose to come back at that time, and he said that he wanted to

come back and serve the sentence in his case. He had knowledge that there was a bench warrant out for his arrest. He acquired this knowledge of the bench warrant and the confiscation of his bail bond from a newspaper in Mexico City, a Los Angeles paper which had been flown down there [Tr. of Rec. Vol. 2, p. 95]. The witness stated he never had any knowledge of any order of the Court requiring him to be in Court at a certain date, at a certain time, and at a certain place, either before or after the month of April, 1953. All that he knew was that there was a bench warrant out for his arrest [Tr. of Rec. Vol. 2, pp. 95-96]. He said to Agent Alston that he assumed a Remittitur had come down after he was in Mexico. He did not say he had any knowledge of the Remittitur; he said he assumed; he didn't know the dates until he saw the Affidavit for Contempt. He found from that affidavit for contempt that the remittitur had come down in March, 1953. He didn't know the dates until he saw it [Tr. of Rec. Vol. 2, p. 96].

He identified Exhibit 2 as a letter he had written to his attorney, and he had given the attorney an explanation why he was in Mexico. He went there to see Mrs. Bray [Tr. of Rec. Vol. 2, pp. 96-97]. On the back of the letter was a notation, "Please make a motion for modification, if the mandate has come down." [Tr. of Rec. Vol. 2, pp. 97-98]. At that time he stated he had no knowledge of any kind as to what kind of action had been taken by the Supreme Court of the United States on the Petition for Rehearing of Certiorari. He had no knowledge of any kind [Tr. of Rec. Vol. 2, p. 98]. When he found out the bond had been forfeited, he wrote the lady who was on the witness stand who had put up her house as security for

the bail bond. He knew she would be worried about the bail bond, since he learned it had been confiscated. He wrote her a letter and told her he would see that she got the $5,000 to pay the bail bond, so that her property could be released; and he did that [Tr. of Rec. Vol. 2, p. 98].

Government's Exhibit 4 is a letter which Mr. Clawson stated he had written. It was dated April 24, 1953, and he stated it was a letter he had written to Dr. Beach. He also wrote a letter to Judge Westover on April 24, 1953, from Chihuahua, Mexico [Tr. of Rec. Vol. 2, p. 100]. In his letter to Judge Westover, Mr. Clawson stated that he had told the Judge he had not been advised as to when he was to appear in Court, but if anything did come up ordering him to appear in court that he would be back at a certain time, and to please hold the proceedings in abeyance until he got back [Tr. of Rec. Vol. 2, pp. 102-103].

The witness stated that since May, 1953, and at the time he was arrested at the airport, on August 20, 1959, he had not returned to the United States. He stated that before he came back to the United States he had told Aduanero, who is the Secretary in charge of Immigration in Mexico, to notify the American Embassy to notify the Security Department that he was returning to the United States to surrender [Tr. of Rec. Vol. 2, pp. 106-107].

The witness stated that the people in Mexico had been demanding money for many years; that they wanted money from him and he said to them, "I am through, take me to the airport." He said he told them he was coming back to surrender, he was through [Tr. of Rec. Vol. 2, p. 108].

The witness stated he was picked up by the Immigration Officers in Mexico; he had paid money before to lawyers and thereafter he would be released. When he was picked up on this occasion, he stated that he was through. He stated they told him they were going to deport him, and he said, "Go ahead." [Tr. of Rec. Vol. 2, p. 117]; that he had been intending for about three months to leave; he had notified an attorney here, Mr. Frank Belcher, that he was returning. He also notified a woman at the time he was picked up that he was returning; he is presently married to her. He sent her a telegram that he was flying into Los Angeles. He sent the telegram just before he left, and three months before that time he had wired his wife that he was returning; that when he was picked up he told the Immigration Officers, "You will tell the FBI?" You are probably going to notify them, notify them for me" [Tr. of Rec. Vol. 2, p. 181].

Government Exhibit 5 was some stationery which Mr. Clawson stated he had had printed with an address in Mexico on it [Tr. of Rec. Vol. 2, pp. 120-121].

Government's Exhibit 6, a bond for appearance of the defendant, was received in evidence as part of the entire file in the proceeding [Tr. of Rec. Vol. 2, p. 129]. A portion of the bond was then read into the record as follows:[1]

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[1]". . . and if the said Raymond W. Clawson will appear for retrial in the United States District Court for the Southern District of California, and abide by and obey all orders made by said court on such day or days as may be appointed for retrial by said United States District Court provided the said judgment and sentence against him be reversed, and shall not depart the jurisdiction of the United States District Court for the Southern District of California without leave, then this recognizance to be void, otherwise to remain in full force, virtue and effect."

The witness was asked whether he had read the portion read to him, and he stated he did not recollect at all [Tr. of Rec. Vol. 2, p. 130]. He stated that he had permission to leave the jurisdiction; that he had been back and forth to Mexico prior to April 20th; he had gone to Florida to try to find this woman [Tr. of Rec. Vol. 2, pp. 131-132]. He had been indicted by Mr. Strong to get permission to leave the jurisdiction because he was going overseas; he went to Honolulu [Tr. of Rec. Vol. 2, p. 132]. Mr. Clawson stated that when he went to Mexico in April of 1953, he did not intend to disobey the lawful orders of the Court, of this Court or any other Court; that he had been going to Mexico on other occasions for a period of twenty years; he made frequent and regular business and pleasure trips to Mexico [Tr. of Rec. Vol. 2, pp. 133-134]. With reference to his letter to Mr. Strong, in which he asked Mr. Strong to obtain a stay until May 15th, he never heard from Mr. Strong in response thereto. He knew the case was in the Supreme Court; he knew it would eventually come down; and he wanted enough time, if the decision did come down, to get back to the United States so he could come into Court. The next thing he learned was his bail had been confiscated and a warrant issued for his arrest [Tr. of Rec. Vol. 2, pp. 134-135]. He stated he had no notice of any kind that his bond would be forfeited; he was not told to appear in Court in regard to the mandate [Tr. of Rec. Vol. 2, p. 135]. Mr. Clawson stated it was his intention to return to the United States regardless of who paid his transportation costs; that he saw Mr. Frank Belcher in Acapulco in July; that he wired his wife. There is a record at Western Union of this. He wired around June 1st that he was returning [Tr. of Rec. Vol. 2, p. 137].

William B. Scruggs testified he was an FBI Agent; that on August 20, 1959, he had a discussion with Raymond W. Clawson; riding in a car from the airport to downtown Los Angeles were Mr. Clawson, Joseph C. Alston and Albert Sayers, both FBI Agents. That in the course of the conversation, Mr. Clawson said he had been in Mexico since 1953, and that while residing in Mexico he had some information about a remitter, which advised him he should report to the United States Marshal [Tr. of Rec. Vol. 2, p. 140]. The officer stated that Clawson had asked him could he see his wife, and he was told no, they would tell her where he was incarcerated [Tr. of Rec. Vol. 2, p. 142].

The witness *Clawson* was recalled and stated that he told the officers that while he was in Mexico the remitter came down [Tr. of Rec. Vol. 2, p. 145].

Summary of Argument.

1. It is our contention that the evidence was insufficient, and certainly the contempt power, used summarily as it was, should be limited to cases wherein it has been established beyond a reasonable doubt that the defendant knew of the order, knew its contents, and that he disobeyed wilfully the said order. The failure of the Court to directly issue a surrender order, directing the defendant and appellant to appear in Court at a certain time, and the failure to deliver such order, had one been made, we assert establishes that the evidence is completely insufficient to establish wilful contempt. There was no specific order which this defendant had knowledge of, and which he disobeyed. To support a judgment, the defendant-appellant must have had specific knowledge of a specific order. He had no notice.

2. The Court erred in denying the defendant's request for a reference to the Grand Jury and proceeding by way of Indictment. This was the type of a crime which we assert required under the Constitution that the defendant's matter be referred to the Grand Jury, that they proceed by way of Indictment, that he have the opportunity to plead thereto, and a trial by jury. It was an infamous crime as defined by the statutes and the Constitution, and he was entitled to be proceeded against accordingly by way of proceedings before the Grand Jury and trial by jury.

3. The punishment was cruel and unusual. In fact, he was given a sentence of 18 months, when under the law in the original charge he was only given one year which was the maximum provided by law, and in connection with this matter Congress has reviewed the matter under the Bail Jumping Act, which was intended to reach, we believe, such cases as this, and there Congress fixed a maximum sentence of one year. The punishment was cruel and it is indicated by the remarks of the Court that he intended to severely punish the appellant. It should be recalled that when the matter came on for trial before Judge Westover, who disqualified himself, the Court had this to say in transferring the case:

> "I just hope Judge Yankwich paddles you enough, that's all." [Tr. of Rec. Vol. 2, p. 8].

ARGUMENT.

I.

The Evidence Was Insufficient to Justify the Verdict of Guilty.

Mr. Clawson is charged with violating, in effect, a Court Order. We a

1. What order was Mr. Clawson violating, where is it, what does it say?

2. When was the order served upon Mr. Clawson or brought to his attention?

It is our contention that the Court was in error in concluding that what was in the bond was sufficient. For instance the Court said, at page 130:

> "The Court: I am not going to repeat what I said yesterday. It is my view that no order other than that which was made was necessary; and this covenant in the bond indicates one of the conditions that he knew was imposed, which was not to absent himself from the jurisdiction without leave of the court. Any document which calls that to the attention of the defendant is permissible in a proceeding of this character.
>
> The objection is overruled. You may answer the question.
>
> The Witness: What was the question?"

The most that can be said is that Mr. Strong, his attorney, knew of the spreading of the mandate, and appeared before the Court. He did not convey the message to Mr. Clawson that the mandate was to be spread, or that he was to be present any certain time in Court.

Neither did he convey to Mr. Clawson that there was any specific order for his appearance in Court. The record is silent upon the question of whether or not any specific order was ever made directing him to be present at a certain time, and whether or not such order was specifically brought to his attention.

In the case of *Green v. United States*, 356 U. S. 165, 2 L. Ed. 2d 672, at pages 219, 220, Mr. Justice Brennen, in a dissenting opinion joined by the Chief Justice and Mr. Justice Douglas, commented concerning the conviction in that case of contempt about an order, which order in part said:

> "Further ordered, adjudged and decreed that the defendants personally surrender to the United States Marshal on the 2nd day of July, 1951."
>
> "This proposed order was served on the attorneys for the eleven and they promised to bring their clients into Court the following Monday, July 2, to begin serving their sentences and Friday, June 29, the attorneys met with all the defendants and advised that they all should be present in Court on Monday, and assured they would be; but by Monday four had absconded. Since seven were present, however, the order on mandate was signed and the seven were taken off to serve their prison terms. The Court cancelled the bail of the missing four on July 3rd and issued a bench warrant for their arrest. True, the four, Hall and Thompson, were apprehended in 1951 and 1953 respectively, and were convicted of criminal contempt.
>
> *United States v. Hall* (C. A. 2d, N. Y.), 198 F. 2d 726;
>
> *United States v. Thompson*, 214 F. 2d 545.

"The petitioners surrendered voluntarily in 1956, and were likewise convicted of criminal contempt. The criminal contempt charged in each instance was a violation of 18 U. S. C., 401(3), by disobedience of the provision of the order on mandate issued on the morning of July 2, 1951, requiring the surrender of all the defendants to the United States Marshal at 11:04 A. M. on that day. Significantly, at the time the Judge signed the order he lined out the hour of surrender appearing as 10:30 in the proposed order, and substituted 11:05, the time at which the order was actually signed.

"The most that can be said is that the evidence might have been sufficient to support conviction of the petitioners for bail jumping. If that had been an offense at the time they fled; but bail jumping did not become a separate crime until three years after the petitioners' flight, when this void in the law, highlighted by the petitioners' conduct, led the Department of Justice to secure the enactment of 18 U. S. C., 3146 . . . Assessment of the sufficiency of the evidence bearing on the petitioners' knowledge requires that the precise time at which the order came into existence be kept clearly in mind." . . .

"Concededly, direct evidence of knowledge by the petitioner of the order of July 2, is wholly lacking and the case for conviction rests entirely upon circumstantial evidence, the proof upon which reliance is placed consists of evidence, (1) that the petitioners knew on June 29, 1951, that the order was

to be entered on July 2nd, and (2) that the petitioners made certain statements to the press at the time of their surrender almost five years later."

The Court says this:

"First, manifestly, foreknowledge that an order might come into existence does not prove knowledge that it did come into existence. Even if the petitioners knew on June 22 that the order was likely to be signed on July 2nd, the most that can be said is that after July 2nd the petitioners knew that the order was to have been entered. This, of course, is not the same as knowledge that the order had been entered, and it is the latter knowledge which the Government must prove beyond a reasonable doubt. Knowledge that the order had been entered, of course, could only be acquired by the petitioners after the order had come into existence on the morning of July 2nd; and that knowledge can hardly be inferred from the events which occurred prior to the moment the order was entered. (See the opinion of Judge Biggs, in *United States v. Hall*, 198 Fed. 2d 726, 733, 735; 34 A. L. R. 2d 1088)."

It is our contention that Clawson had no knowledge of any order requiring him to appear in Court at any certain time; and, notwithstanding the aforementioned quotes have been from a dissenting opinion, no better argument can be advanced for our position here. It must be established beyond a reasonable doubt that

Clawson had knowledge of an order requiring him to appear at a certain time, and it must be established beyond a reasonable doubt that he had knowledge of the time and place where he was to appear. There is no evidence from which it can be reasonably deduced that he had any such knowledge, or, in truth and in fact, there was no specific order. This is established by the fact that the Court has adopted the theory that the statements in the bond itself were sufficient to require Clawson to appear.

The section under which the prosecution is conducted, namely, Title 18 U. S. C. 401.[2]

In *Berry v. Midtown Service Corp.*, 104 F. 2d 107, it was said:

> "Before a person should be subject to punishment for violating a command of the Court, the order should inform him in definite terms as to the duties thereby imposed upon him. . . . We believe it is a wiser policy to punish as contempt only the disobedience of some express command, such we understand to be the general rule."

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[2]Section 401. Power of Court. A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—

(1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;

(2) Misbehavior of any of its officers in their official transactions;

(3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command. June 25, 1948, c. 645, 62 Stat. 701.

Much has been said in this case about the "mandate." The rule of the Circuit Court of Appeals, Ninth Circuit, relating thereto, Rule 26, provides.[3]

This rule provides in substance that after cases have been finally determined in the Circuit Court other than original proceedings, a mandate or other process in the nature of a proceeding shall upon the payment of costs due be issued from the Circuit Court to the court below for the purpose of informing such court of the proceedings in the Circuit Court, so that further proceedings may be had in such court as the law and justice may appertain. Such mandate, if not stayed, shall be issued on the expiration of 30 days from the date of final determination, or unless a petition for rehearing is filed, in which case the mandate shall be stayed until 5 days after the determination of such petition.

Even if Clawson had knowledge of the issuance of a mandate, that would not be an order in which he could now be held in contempt or thereafter could have been held in contempt. That is merely a proceeding between the courts. As the rule says, it is an order from the Circuit Court to the lower court. Thereafter, other proceedings must be had and orders issued. There is

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[3]"Rule 26. Mandate.

"In all cases finally determined in this court other than original proceedings, a mandate or other proper process in the nature of a proceedings shall, upon the payment of any costs due in the case, be issued, as of course from this court to the court below, for the purpose of informing such court of the proceedings in this court, so that further proceedings may be had in such court as to law and justice may appertain. Such mandate, if not stayed by the order of a Circuit Judge who participated in such decision shall be issued on the expiration of 30 days from the date of such final determination, unless within said time a petition for rehearing be filed, in which case the mandate shall be stayed until 5 days after the determination of such petition."

no knowledge that could be imputed to Clawson and, even if it were, this is a quasi-criminal proceeding, we contend it is a criminal proceeding, and his guilt would have to be established beyond all reasonable doubt. There is no evidence to justify such a conclusion, notwithstanding the discussions about mandate or remitter.

The case should be reversed by reason of the insufficiency of the evidence.

II.

The Court Erred in Denying the Defendant's Request for a Reference to the Grand Jury and Proceeding by Way of Indictment to the End He Might Have a Trial by Jury.

This was a serious offense and comes well within the definition of "what offenses are infamous crimes," which under the Fifth Amendment must be prosecuted by indictment or presentment. It must be remembered that the defendant in this case was given 18 months in prison which is 6 months more than the maximum permitted in misdemeanor cases under the "Bail Jumping Act."[4]

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[4] 18 U. S. C. 3146:

"Jumping Bail. Whoever, having been admitted to bail for appearance before any United States commissioner or court of the United States, incurs a forfeiture of the bail and willfully fails to surrender himself within thirty days following the date of such forfeiture, shall, if the bail was given in connection with a charrge of felony or pending appeal or certiorari after conviction of any offense, be fined not more than $5,000 or imprisoned not more than five years, or both; or, if the bail was given in connection with a charge of committing a misdemeanor, or for appearance as a witness, be fined not more than $1,000 or imprisoned not more than one year, or both.

"Nothing in this section shall interfere with or prevent the exercise by any court of the United States of its power to punish for contempt. Added Aug. 20, 1954, c. 772, Sec. 1, 68 Stat. 747."

We ask the Court to carefully review the situation with reference to the right of proceeding by way of presentment or indictment of a Grand Jury and trial by jury.

It is our contention that the Fifth Amendment to the Federal Constitution specifies that no person shall be held to answer for a capital "or otherwise infamous crime unless on a presentment or indictment of a Grand Jury." It is a firmly established principle that whether a crime is "infamous" so as to be within the Fifth Amendment's guarantee of Grand Jury presentment or indictment is determinable not in accordance with the character of the crime itself. (See *Weeks v. United States*, 216 F. 2d 292), nor in accordance with whether Congress has denominated the crime as infamous, but in accordance with the punishment the Court has the authority to impose therefor. A crime which is subject to infamous punishment is, except in limited situations, held to be an infamous crime as to which prosecution by presentment or indictment is required.

See Annotation, Infamous Crimes, *Green v. United States*, 2 L. Ed. 2d 672, at 1960, 1963.

We urge that the courts are agreed that a crime which is punishable by imprisonment in a penitentiary (with or without hard labor). *United States v. Dewalt*, 128 U. S. 393, is (except where its status under the Constitution clearly indicates that it is not infamous, or where the accused can be imprisoned in a penitentiary only when he consents thereto, an infa-

mous crime within the meaning of that term as used in the Fifth Amendment).[5]

Undoubtedly, this was an infamous crime. He was given 18 months and the court indicated itself that it could give a much more severe sentence, and the court repeatedly throughout the trial said that this is a serious situation. The defendant was entitled to demand and be proceeded against by way of proceedings before the Grand Jury and indictment, and thereafter by plea and trial by a jury, and it was error on the Court's part to deny to the defendant and appellant a request therefor, as timely made at the outset of the trial.

We realize that the Courts sometimes are reluctant to digress from prior decisions and prior practice, but we believe that this case is an appropriate one. As was said in *Green v. United States, supra*, 356 U. S. 165, at 195, in the dissenting opinion:

> "Ordinarily it is sound policy to adhere to prior decisions but this practice has quite properly never been a blind, inflexible rule. Courts are not omniscient. Like every other human agency, they too can profit from trial and error, from experience and reflection. As others have demonstrated, the principle commonly referred to as stare decisis has never been thought to extend so far as to prevent the courts from correcting their own errors. Ac-

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[5]See *Green v. United States*, 2 L. Ed. 2d 672, Annotation, Infamous Crimes, 2 L. Ed. 2d 1964, subsection 3, where the cases are assembled.

cordingly, this Court has time and time again from the very beginning reconsidered the merits of its earlier decisions even though they claimed great longevity and repeated reaffirmation. See *Erie v. Tompkins*, 304 U. S. 64, 82 L. Ed. 1188, *Graves v. New York*, 306 U. S. 466, 83 L. Ed. 927, *Nye v. United States*, 313 U. S. 33, 85 L. Ed. 1172, where it was said:

"'I am quite willing that it be regarded hereafter as the law of this court, that its opinion upon the construction of the Constitution is always open to discussion, when it is supposed to have been founded in error, and that its judicial authority should hereafter depend altogether on the force of the reasoning by which it is supported.' (Quoting Chief Justice Taney, in the Passenger Cases, 7 How. 283, 12 L. Ed. 781.) Indeed, the Court has a special responsibility where questions of constitutional law are involved to review its decisions from time to time and where compelling reasons present themselves to refuse to follow erroneous precedents."[6, 7]

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[6]Dissenting opinion in *Green v. United States*, 356 U. S. 165, at 195, 196.

[7]See *Burnet v. Coronado Oil & Gas Co.*, 285 U. S. 393, 405, 76 L. Ed. 815, 823. It has been said:

"Within the past few years there has been a tendency on the part of this court to restrict the substantive scope of the contempt power to narrower bounds than have formerly been thought to exist. See *Green v. United States*, Footnote 5, 356 U. S. 165, 196. (Citing *Bridges v. California*, 314 U. S. 252, 86 L. Ed. 192, In re Oliver, 333 U. S. 257, 92 L. Ed. 682.)"

III.

The Punishment Was Cruel and Unusual and in Violation of the Eighth Amendment to the Constitution.

The Court pronounced a judgment of 18 months in the custody of the Attorney General, and the defendant pursuant thereto was committed to the Federal Correctional Institution at Terminal Island.

The so-called Bail Jumping Act, hereinbefore referred to, fixes a maximum punishment of one year for a misdemeanor, which this is, and an 18 months sentence in the Federal Penitentiary, we urge, violates the Eighth Amendment to the Constitution which provides against "cruel and unusual" punishment.

In *Trop v. Dulles*, 356 U. S. 86, 2 L. Ed. 2d 630, at 356 U. S. 100, the Court said:

> "The exact scope of the constitutional phrase 'cruel and unusual' has not been detailed by this Court. But the basic policy reflected in these words is firmly established in the Anglo-American tradition of criminal justice. The phrase in our Constitution was taken directly from the English Declaration of Rights of 1688, and the principle it represents can be traced back to the Magna Carta. (Footnote: See 34 Minn. L. Rev. 134; 4 Vand. L. Rev. 680)."

See also collection of cases in footnote, *Trop v. Dulles*, 356 U. S. 86, page 100.

The Court also said in *Trop v. Dulles*, *supra*:

"While the State has the power to punish, the Amendment stands to assure that this power be

exercised within the limits of civilized standards. Fines, imprisonment and even execution may be imposed depending upon the enormity of the crime, but any technique outside the bounds of these traditional penalties is constitutionally suspect."

Certainly, the punishment of 18 months comes within the prohibitions laid down in *Trop v. Dulles, supra*, for the very Bail Jumping Act itself, as we have heretofore set forth, after considerable study and consideration by the Congress, only provides for a maximum punishment of 12 months in a misdemeanor case.

The Circuit Court Decision.

The Circuit Court decision merely affirmed the judgment of the District Court and we are, therefore, unable to comment upon it, except to say that it is in error. No reasons are given for the affirmation.

Conclusion.

We respectfully urge that the petition has justice and authorities on his side, and this Court should grant Certiorari to the end that the judgment of the District Court, and the opinion of the Circuit Court of Appeals affirming said lower court judgment, be reversed.

Respectfully submitted,

RUSSELL E. PARSONS,

Attorney for Petitioner,

Raymond W. Clawson.

APPENDIX.

Opinion of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals for the Ninth Circuit.

Raymond W. Clawson, Appellant, vs. United States of America, Appellee. No. 16,971, Dec. 6, 1960.

Appeal from the United States District Court for the Southern District of California, Central Division.

Before: Barnes, Hamlin and Jertberg, Circuit Judges Per Curiam:

The judgment of the district court finding appellant guilty of criminal contempt of court in violation of Title 18 U. S. C. §401(3) is *affirmed*.

(Endorsed) Per Curiam Opinion Filed Dec. 6, 1960.

FRANK H. SCHMID, Clerk.